CASE NO.: CA

24/2012

IN THE HIGH COURT OF NAMIBIA

In the matter between

SILVANUS AMUNYELA

APPELLANT

versus

THE STATE

RESPONDENT

CORAM: **SIBOLEKA, J**

Heard on: **2012 June 18**

Delivered on: **2012 June 28**

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UDGMENT: BAIL APPEAL

SIBOLEKA J:

[1] Mr. Sisa Namandje was the appellant's counsel in the Court *a quo* and during the hearing before this Court while Mr. Khumalo appeared for the respondent. I wish to express my indebtedness to their valuable contribution in this regard.

[2] In the Court *a quo* Ms. Hinda, on behalf of the State, successfully opposed the granting of bail to the appellant on some of the following reasons:

Interference with state witnesses, and police investigations; the risk of re-offending, the strength of the state's case, the seriousness of the alleged offence, public interest, danger to the victims, administration of justice, investigations not yet finalized.

[3] On 18 June 2012 I ruled against Magistrate Gawanab's refusal to release the appellant on bail. I granted bail in the amount of N$5,000.00 on the following conditions:

- That the appellant is restricted to his residence at Erf No. 38, Olivier Street, Khomasdal, Windhoek for the duration of the proceedings against him.
- He is only allowed to move from his house to work and back to his residence.
- In the case of sickness he is only allowed to visit the health facility and back to his residence.

- He must not make contacts or cause the same to be made directly or indirectly in any manner with the parents, the complainants, and the witnesses on this matter.
- He must surrender his firearm to the Investigation Officer with immediate effect.
- The Investigation Officer and the police in general are ordered to assist and put mechanisms in place to ensure the observance of the conditions set out here and to see to it that they are at all times complied with.
- He should not suspend any maintenance obligation in favour of any complainant.

[4] An application for bail is urgent in nature. It is not always possible to furnish there and then substantiation in support of the ruling handed down, and this matter was not an exception. Here now is why I ruled as alluded to above.

[5] The forty one year old male Namibian was arrested on 22 February 2012 and charged on several counts of Rape and Indecent Assault on his biological daughters.

[5.1] The allegations of rape stretch as far back as 1993, and were not reported immediately as they occurred. It was only when Emily related these crimes to Major-General Hifindaka that the matter started

receiving attention and investigations were launched. While none of the complainants testified, a total of six witnesses gave evidence before the Magistrate on behalf of the State.

[5.2] It should however be pointed out that hearsay evidence is permissible in certain circumstances (see *S v Maharaj* 1976 (3) SA 205 at 208 F – H; *S v de Kock* 1995(1) SACR 299 at 310C). In my view Mr. Namandje correctly argued that the hearsay evidence which was disputed by the appellant under oath should not have been relied on by the Magistrate to refuse bail because it lost its weight. I am aware of the fact that the purpose of the evidence of the six witnesses in the Court *a quo* was not to prove the allegations against the appellant beyond reasonable doubt, but only to indicate that there was a probability or a possibility that if he was released on bail he would hamper or hinder the proper course of justice.

[5.3] This appeal judgment is only in regard to the refusing of bail to the appellant and it would therefore be inappropriate to go into the merits of the matter. I will however mention that from the record, the fact that the crimes were allegedly perpetrated by the appellant being the father of the complainants, in my view, the father–child relationship heavily contributed to the delay in reporting them for fear of reprisals. Chief Insp. Cronje stated during cross-examination in the Court *a quo* that Emilia told her that she did not mention that she was

raped in the protection order because she was afraid and ashamed that the appellant would then know about it in the copy handed to him. I accept Emilia's explanation, any child would react that way to her father.

[6] The grounds of appeal are as follows:

> "1. The learned Magistrate erred in finding that there is a strong case against the Appellant.
> 2. The learned Magistrate erred in finding that if the Appellant is granted bail he may reoffend.
> 3. The learned Magistrate erred in meekly attaching undue weight to contradictory and inconsistent hearsay evidence when such evidence was materially disputed through evidence under oath.
> 4. The learned Magistrate erred in not properly and fairly asserts and analyze the evidence placed before him in an objective manner.
> 5. The learned Magistrate erred in finding that it will not be in the interest of the public and the administration of justice if the Appellant is released on bail.
> 6. The learned Magistrate erred in not finding that the Applicant proved that it will be in the interest of justice that he is granted bail.
> 7. The learned Magistrate without a proper basis in law unfairly rejected the Appellant's and his witness' evidence."

[7] From the introduction of his heads of argument the main thrust of the above grounds appear to be what he summed up as follows:

- He argued that the Magistrate committed irregularities by his inability to be objective, fair, and to competently, impartially

analyze the evidence before him. This, according to this counsel, was indication that he lacked knowledge of the rules of evidence.

- He submitted that there was a complete failure of justice during the bail application in that the State agents, the Prosecutor, police officials, and the State witnesses handled the matter with a conspicuous lack of objectivity and impartiality.

[8] This argument is not correct because in my view the Magistrate has properly discussed and analyzed all the evidence placed before him, finally substantiating the reason why he decided to rule the way he did, (deny bail).

[8.1 Mr. Namandje referred to various authorities among them:

- *Mylene Swanepoel v The State*, an unreported judgment by this Court, delivered on 30 June 2012 where the amendment to section 61 of the Criminal Procedure Act, directing that even if no likelihood of absconding existed, bail could still be denied if that would be in the interests of the public and the administration of justice.
- *Camps Bay Rate Payers and Residents Association & Another v Harrison & Another* 2011(4) SA 42 CC where adherence to the principle of presidency was emphasized.
- *Charlotte Helena Botha* Case No. 70/1995 where hearsay in bail applications, although admissible was found to carry very

little weight if any; and that it should not be relied on where it is disputed.

- *S v Branco* 2002(1) SACR 531 where it was stated that in bail applications Courts should lean in favour of and not against the liberty of the accused as long as the interests of justice will not be prejudiced.

[9] Mr. Khumalo opposed the granting of bail to the appellant, praying that the ruling of Magistrate Gawanab be confirmed.
He submitted that in cases of bail the applicable principle was that of upholding the liberty of the individual, simultaneously protecting the administration of justice. He referred to various cases among them:

- *S v Barber* 1979(4) SA 218(D) wherein Appeal Courts were reminded not to substitute their own views for that of the Magistrate.
- *S v Du Plessis & Another* NR 74 wherein the provisions of section 65(4) of Act 51 of 1977 enjoining Appeal Courts not to set aside the decisions against which appeals are brought unless they are satisfied that they were wrong.

[10] I am in accord with the reasoning of the Courts in the cases referred to by both counsel. It must also be mentioned that every case must be treated on its merits. At the same time the seriousness of the

crime and the possible frustration of any of the facets related to the smooth turning of the wheel of justice are among others decisive in the granting or refusing to release a suspect on bail.

[11] I will now look at the reasons why the Magistrate refused to release the appellant on bail:

[11.1] The Magistrate stated that:

- The State has a strong case.
- The crimes he faces are serious.
- The appellant had sexually assaulted at least six women: Tauno, Emily, Simaneta, Hetta, Selma and Iyaloo.
- He also violently molested 15 other girls, whose cases have been investigated.
- There is a case against him at the Prosecutor-General's office.
- Some of the above alleged crimes have been committed while he was out on bail.
- Interference with state witnesses was dismissed.
- He found relevancy in the danger of the threats of violence against the complainants if they spoke out about what he was allegedly doing to them.
- The fact that the appellant could have killed himself and the complainants but did not do so, and instead handed himself over to the police, did not mean that he may still not do so, now that the charges against him have reached an advanced

stage. However neither of the two counsel ever mentioned any possible suicidal inclinations on the part of the appellant during the hearing of the appeal before this Court.

- The risk to police investigations was dismissed.
- He stated that the complainants who know the appellant very well and live close to him appreciate the risk of real danger of being killed. Those complainants did not testify in the Court *a quo.*
- Emily is more frightened because she has finally talked about how the appellant abused her. She did not testify in the Court *a quo.*
- The appellant has, in addition to a lawfully obtained firearm, a hidden unlicensed firearm as well. This threat can be overcome by investigations and a thorough search of his house.
- According to the Magistrate the police had ample time to finalize their investigation, obtaining all statements from crucial witnesses, their failure to do so was implored.
- He found no reason why statements from the complainant Iyaloo and her mother were not yet obtained when their residence is known to the police.

- There are Woman and Child Protection Centres in all regions, he did not see the reason why only officers from Windhoek should travel all the way to the North to obtain the same.
- The 15 girls who opted to give statements during school holidays should have been encouraged to do so during weekends to curtail delays seeing that the exercise does not require such a long time to complete.
- He found that it was not required for the appellant to be in custody in order for the police to finalize their investigations.
- According to him it is in the interests of society that suspects detained for offences such as those before Court should be kept in custody and dealt with according to law.
- He stated that the release of the appellant will endanger his own life as well as that of other members of society.
- Society requires protection and that suspects such as the appellant be tried, and if proven guilty sentenced accordingly.
- His release amid the risk of committing further crimes, the danger to society would not be in the latter's interests and would be a mockery of justice.
- He concluded that there was a real risk that the appellant will commit further crimes; faces serious charges, is a danger to the complainants, and therefore the interests of society, the

administration of justice demanded that he be kept in custody until the finalization of his trial.

[12] Here is how the Magistrate summed up his findings, I quote *verbatim* from page 980 (802) of the transcribed record:

> "I am therefore convinced that there is a real risk that the accused will commit further crimes if admitted to bail and no bail condition can prevent this from happening." (My own underlining)

[13] On the record it is stated that the appellant is currently married to a Unam student, who is not the mother of the complainants. It is my considered view that seeing that all the complainants are residing with their mothers, a house arrest that would prohibit him from going out anywhere else apart from his workplace and a health facility in case he becomes sick would be the most appropriate route to take. That measure would enable the appellant to continue with his work at Telecom, any existing financial obligations in favour of any of his children, as well as payments towards his house.

[14] After having carefully listened to the submissions of both counsel, in conjunction with all the documents filed of record on this matter, the fact that the allegations of rape emanated from the appellants own biological children; that there are some statements that still have to be obtained from a number of witnesses. I had a different

view to the one set out above by the Magistrate. I was satisfied that stringent bail conditions would easily rescue the alleged concerns.

[15] In *S v Essack* 1965(2) SA 161 DCLD the appellant, an attorney, stated in his evidence under oath, not materially contradicted, that he enjoyed a fairly lucrative practice, the main object for asking to be released on bail was to return and try to rehabilitate it. The Court found in his favour, holding that before it can be said that there is a likelihood of justice being frustrated it was required that some evidence or indication which touches the applicant personally in regard to that likelihood must be placed before Court. The Court was also of the view that it was necessary to strike a balance as far as that can be done between protecting the liberty of the individual and safe guarding and ensuring the proper administration of justice. Bail was granted with conditions.

[16] In bail applications where further detention of the suspect is required on the basis of perceived threats to the complainants and members of the society, O'Linn J as he then was stated the following on the last paragraph at page 24 of the record:
Charlotte Helena Botha vs The State Case No. CA 70/1995 delivered on 2 October 1995:

> "The legal convictions of the community, in my view, will hold that an accused person should not be released on bail in the situations ... provided there is *prima facie* proof against such person that he or she has committed the type of serious crime ... and is therefore in the opinion of the Court, a potential threat to the victims or to other innocent members of society or is perceived by them on reasonable grounds to be such a threat."

[16.1] The Judge went further and stated in the last sentence at the bottom of the same page to page 25:

> "That such *prima facie* proof must be provided when detention is required, particularly detention past the stage when the investigation can be reasonably expected to be concluded, is in itself in the public interest and the interest of Justice because an accused person also has fundamental rights, the protection of which are in the interests of the public and of the administration of justice, as enshrined in the Constitution of Namibia as well as in our criminal law and procedure."

[17] In the result I was satisfied that bail in the amount of N$5,000.00 coupled with stringent conditions would strike a balance between the interests of the still innocent appellant and the administration of Justice.

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SIBOLEKA, J

COUNSEL ON BEHALF OF THE APPELLANT: MR. NAMANDJE

INSTRUCTED BY: SISA NAMANDJE & CO. INC.

COUNSEL ON BEHALF OF THE RESPONDENT: ADV. KHUMALO

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